Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1019

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

MOORE OF BEDFORD, INC., and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, the Textile Workers Union of America, AFL-CIO, prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 15, 1971.

Opinions Below

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at —— F.2d —— and at 78 LRRM 2769 (1971) and is printed in the Appendix at page 1a.

The case came to the Court of Appeals on Petition for Review and Cross Application for Enforcement of a Decision and Order of the National Labor Relations Board. The Decision and Order of the Board is reported at 187 NLRB No. 87 and is printed in the Appendix at page 11a:

The Trial Examiner's Decision is printed in the Appendix at page 24a.

Jurisdiction

The Judgment of the Court of Appeals is dated November 15, 1971 and was entered on that date.

Jurisdiction to review, by Writ of Certiorari, the judgment of the Court of Appeals is conferred upon this Court by the provisions of 28 USC Section 1254(1) and by Section 10(e) and 10(f) of the National Labor Relations Act, 29 USC Section 160(e) and (f).

Question Presented

In a situation where the actual effect of a decision by the United States Court of Appeals for the Fourth Circuit which ignores the mandates of this Court will be to destroy collective bargaining and chill voluntary labor arbitration —and where that decision is part of a pattern in which the Fourth Circuit consistently denies enforcement of NLRB orders in Textile Workers Union cases—should that decision be permitted to stand, unreviewed by this Court?

Statutory Provisions Involved

Provisions of United States statutes pertinent to this case are as follows:

"Employees shall have the right * * * to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining * * *"

29 USC Section 157

"It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this Title."

29 USC Section 158(a)(5)

"Representatives designated or selected for the purpose of collective bargaining by the majority of employees * * * shall be the exclusive representatives * * * for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment."

29 USC Section 159(a)

"The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

29 USC Section 160(e)

Statement of the Case

The Moore of Bedford Company manufactures upholstered furniture at its Bedford, Virginia plant where the Textile Workers Union has been the certified collective bargaining representative for the Company's employees since 1948. Two-thirds of the employees are paid on a piece-work basis, and the ever-changing styles of furniture design require that they be paid at incentive piece-work rates set through complex time-study and industrial engineering techniques. Rates are set for each detailed operation the worker must perform, and the number of separate and distinct operations for which rates are fixed totals more than 2,000 in any given year.

Because it is patently impossible for the Union and the Company to bargain about each of the 2,000 individual rates, collective bargaining in the furniture industry is far removed from the usual patterns of collective bargaining about "wages" in industries using hourly paid or predetermined piece-work rate employees.

The contract between the Moore of Bedford Company and the Textile Workers Union had, for twenty years, always been concluded following a multi-step bargaining process, involving three distinct "rates" of pay: the "base rate," the "piece-work-rate yield," and the "actual earnings rate." The "base rate" is a dollar-per-hour figure written into the contract and represents the minimum amount that an employee could earn per hour. A piece rate for each of the 2,000 individual operations would be set on the basis of time-study techniques. The contract

had always provided a minimum piece rate yield such that "an average employee could, with the exercise of incentive effort, earn not less than 25% above the base rate." In most piece-rate-incentive systems and, theoretically, here, the basis of the time study would be to set the piece work rate so as to yield a dollar-per-hour amount somewhere in the area of 25% above the base rate. Under the unique system at Moore of Bedford, however, in practice the piece work rates were actually set so that their yield would be reflective of each employee's prior actual earnings and had no relationship to the "base plus 25%" system. Thus, in 1965, although the base rate was set at $1.28 and the minimum piece rate yield (base plus 25%) would have been $1.60, the time studies were geared to set piece rates which reflected the actual earnings of the employees, at that time between $1.80 and $2.10 per hour. In December of 1968, the base rate was $1.70 but the actual earnings had risen to a range of $2.24-$2.84 per hour. It is apparent that neither the artificially low base rate nor the theoretical minimum-piece-rate-yield bore any relationship whatsoever to what these employees had long been paid and what they were going to be paid in the future.

Because the Union could not effectually bargain about each of the 2,000 piece rate changes, the Union's turn to bargain came about through the contractual right to file grievances after a particular piece rate had been set, and to take these grievances to binding arbitration. The Union had, for many years, also attempted to have the Company raise the base rate from its artificially low dollar amount to a dollar amount in the area of the employees' actual earnings. The Company, however, had pushed bargaining off of this point, maintaining that the base rate was never

used to determine the actual piece rate yield and that there was, thus, no reason for it to be raised. This well-established, although apparently confusing, system had been in effect for almost twenty years and had worked to the satisfaction of the Company, the Union, and the employees.

"Wages go to the heart * * * of any collective bargaining agreement, and no citation of authority is necessary to support the cardinal rule of law that the employer is duty bound to discuss them, to bargain about what they shall be, with the employees' bargaining representative. When the wages are fixed in the contract—as in the usual case of hourly pay, or pre-determined piece work compensation—he discusses them with the Union, and, as agreed by the parties, the wages are written into the contract. When he sets them after the contract has been signed—because he chooses to utilize a time-study incentive method to determine constantly changing piece work rates—he bargains about them when he has set them, or immediately thereafter if the bargaining agent for any reason believes they are wrong * * * but be it before or after the agreement is signed, bargain about them he must, and the fact the employer uses a time-study engineering method does not alter the rule of the law." (Trial Examiner's Decision, Appendix, page 39a).

Between 1948 and 1968 the Union had filed many grievances over the setting and the yield of individual piece rates and all such grievances had been resolved through bargaining between the Company and the Union, without the necessity for arbitration. In 1968, for the first time, four grievances were taken to arbitration. The Company

argued that it had the right to set piece rates at any level and that the Union could not file a grievance so long as the employee was capable of earning at least the minimum yield (base rate + 25%). The Union argued, on the contrary, that an employee's "wages" were his actual earnings and bore no relationship to the Company's base rate. The Union contended that the only time it could "bargain about wages" was through the grievance procedure after a piece rate had been set by the Company. The Arbitrator agreed with the Union, and his award instructed the Company and the Union to bargain about the piece rates involved in light of his interpretation of the contract. The Union and the Company, through bargaining, resolved the grievance.

In December of 1968, immediately prior to the contract's expiration, the Union and Company entered into negotiations for a new contract. The Company made it clear at the negotiation meetings, and admitted at the NLRB hearing, that it insisted upon a change in the contract such that any future dispute over the setting of piece work rates would be decided upon the basis of its reading of the earlier contract, the view that had been rejected by the Arbitrator, and, further, that the grievance procedure would be limited solely to determining whether the employees could earn the base rate. Thus, a juxtaposition of the average "actual earnings" of piecework employees ($2.55 an hour) and the proposed limitation on piecework grievances ($1.80 an hour) reveals that the Company was insisting on a contract provision giving it the power to pay its piecework employees anything it wanted beyond a minimum which was meaningless in light of what the employees were then earning. The Company could set rates

so that an incentive employee could earn anywhere from $2.55 an hour to $1.80 and there was nothing that the Union could do about it. Realistically, it would be the Company and the Company alone which would determine the earnings of piece-rate workers. In essence, the Company was demanding that the subject of wages be removed from the scope of collective bargaining if the Union wanted a contract.

Upon direction of the General Counsel, the Regional Director issued a complaint alleging that the Company, through its insistence upon such a scheme, had refused to bargain with the Union in good faith. An extensive hearing was held before Trial Examiner Thomas Ricci and, in June of 1970, his Decision issued. It found the Company in violation of Section 8(a)(5) of the Act and stated:

> "When the critical phrases in the contract proposal, without which the Respondent would in no circumstance sign any agreement, are considered together with the reality of what the current wage rates were and what the Company intended them to be in the future, the conclusion is inescapable that its purpose was to remove the Union as a voice in the determination of what two-thirds of the employees would be paid for their work throughout the life of the contract." Appendix, page 40a)

Reviewing the findings of the Trial Examiner, the National Labor Relations Board held:

> "In our opinion the record and the course of bargaining support the Trial Examiner's decision that the Respondent's purpose was to remove the Union as a voice in the determination of what two-thirds of the employees would be paid for their work and indicated

an insistence upon the right to set wages at will throughout the life of the contract without regard to the existence of a bargaining agent as spokesman for the employees.

We find no merit, contrary to our dissenting colleague, in the position that the Respondent was merely attempting to permit itself greater flexibility in changing rates so long as a specified earning level was maintained, and that its adamant position in this regard was motivated solely by a willingness to negotiate over the earnings level rather than subject itself to possible arbitration over the approximately 2,000 separate piece rate changes generally made each year. The record showed that most employees were paid far more than the so called established 'specified earning level' and that the average rate of pay for the employees in question well exceeded such base rates. Thus, it was in fact the incentive rates, not the base rates, which established the employees' pay. Accordingly, it is clear * * * the Respondent's position carried with it unilateral control over the effective wages which would be paid to the incentive pay employees." (Appendix, pages 12a-13a)

The Board went on to state:

"* * * It can not be said that the Respondent was bargaining in good faith concerning the earnings level and, in fact, it appeared that the Respondent's aim was to remove the actual level of earnings from the area of collective bargaining. That this is so becomes more apparent when it is recalled that the Respondent was seeking to avoid an Arbitrator's Award holding that such earnings level was arbitrable." (Appendix, page 13a, fn. 2)

The Union had argued, in brief to the Board, that where this Company, after a 20-year bargaining relationship, sought suddenly to remove from that bargaining relation-

ship an area of vital, crucial concern, that such conduct was not motivated by sincere desire to bargain in good faith, but rather by a desire not to bargain. The Board held that in the long-established background of bargaining between the Moore of Bedford Company and the Textile Workers Union "arbitration of earnings levels had become an accepted part of the contractual relationship. It was not the minimum base rate but the average earnings received under the incentive system here which the Union considered as the wage rate, and an integral part of the wage structure. And indeed this was how the contract was interpreted in a series of arbitration awards." (Appendix, pages 14a-15a)

Upon these considerations, the Board affirmed the Trial Examiner's findings that the Moore of Bedford Company had refused to bargain in good faith and had, thereby, violated Section 8(a)(5) of the National Labor Relations Act.

The United States Court of Appeals for the Fourth Circuit denied enforcement, stating that:

> "The idea that the Company was refusing to bargain about wages merely by insisting upon its proposals, independent of what the base rate was, is untenable because the Board's theory depends upon the base rate being so low as to be meaningless. Therefore, we find that the Board's conclusion that the Company refused to bargain about wages is not supported by substantial evidence." (Appendix, page 9a).

As a direct result of the Fourth Circuit's decision, the employees who had engaged in a year-long strike in protest against the Company's failure to bargain in good faith lost their status as unfair labor practice strikers and, thus, were denied the right to immediate reinstatement and back

pay. As a further result of the Fourth Circuit's decision, the Textile Workers Union has been denied a voice in the setting of wages for the employees it represents at the Moore of Bedford Company.

It is from the Decision of the Fourth Circuit that we seek review by this Court for the reasons indicated in the section of this Petition entitled "Reasons for Granting the Writ."

Reasons for Granting the Writ

The Court should grant certiorari in this case because, if it does not, the actual, practical effect of the Fourth Circuit's Decision will be to destroy the right of workers to bargain collectively regarding wages wherever an incentive system applies. The Fourth Circuit's Decision chills voluntary labor arbitration, blatantly disregards this Court's Decision in *Universal Camera Corp.* v. *NLRB*, 340 US 474 (1951), and subverts the purposes of the National Labor Relations Act.

In this case the Fourth Circuit has again, as it has done before, paid mere lip service to the *Universal Camera* rule. Through its flagrant disregard of the unique expertise of both the Trial Examiner and the NLRB in complex labor matters, the Fourth Circuit has reached an absurd result that offends the basic tenets of industrial engineering and evinces an obvious and complete ignorance of collective bargaining in the area of piece-rate arbitration. As above-noted, the Trial Examiner (after an extensive hearing involving testimony by skilled industrial engineers and other experts in furniture-piece-rate bargaining) concluded that "actual earnings" (rather than artificially-low "base

rate") constituted the "wages" of the employees herein. The Board affirmed. The Fourth Circuit, lacking any expertise in the matter, interposed its own theory that bargaining about the "base rate," even in the unique Moore of Bedford situation, was the equivalent of bargaining about "wages" and (as a consequence of that theory) found no refusal to bargain and denied enforcement. It was, we believe, a desire to prevent just such disregard of industrial reality that led this Court to hold that the NLRB's findings within the field of complicated and abstruse labor matters:

> "carry the authority of an expertness which the Courts do not possess and therefore must respect."
>
> *Universal Camera Corp.* v. *NLRB* (340 US 474, at 488; 1951)

The result reached by the Fourth Circuit goes far beyond the "gross misapplication" test required for this Court's intervention in Labor Board matters and it should, even standing alone, warrant the grant of certiorari. There is, however, more. As the second argument in our petition will reveal, in this case, as in 75% of cases in 1970 and 1971 in which the Textile Workers Union was the successful Charging Party in NLRB proceedings, the Fourth Circuit has denied enforcement of NLRB Decisions and Orders in favor of the Textile Workers Union of America. Furthermore, the NLRB has repeatedly refused to seek certiorari before this Court. As a result, the National Labor Relations Act is being emasculated in Virginia and the Carolinas by the decisions of the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit's Decision Destroys Collective Bargaining, Chills Voluntary Labor Arbitration and Ignores the Mandates of This Court.

It is not the business of a court, either this Court or the Fourth Circuit Court of Appeals, to understand the intricacies of setting piece rates for the production of furniture. We do not expect this Court to be interested in the complexities of a piece rate collective bargaining system, nor do we expect this Court to grant review of the Fourth Circuit's decision based on our superficial explanation of the piece rate system here. We do expect, however, that this Court will understand that the Fourth Circuit wholly lacks any degree of expertise in this area of collective bargaining and should have deferred to those who did have the requisite expertise.

The merits of this case were tried before a Trial Examiner of the National Relations Board, who was charged with the duty and responsibility of weighing all the evidence and making findings of fact and conclusions of law. During the course of the hearing, the Trial Examiner took direct testimony from numerous experts in furniture-piece-rate bargaining, heard them defend their positions under cross-examination, and was able to ask questions so that he could understand the multi-step piece rate bargaining system at issue. The National Labor Relations Board, through the exercise of its unique expertise in labor matters, and pursuant to the mandates of the Administrative Procedures Act, conducted a complete review of the findings and conclusions of the Trial Examiner. The NLRB had available to it the entire transcript of the hearing, the Company's Statement of Exceptions and the briefs sub-

mitted by the Company, the General Counsel and the Union. Following its extensive review, the NLRB adopted and affirmed the findings, conclusions and recommendations of the Trial Examiner.

It was not the function of the Fourth Circuit Court of Appeals to become involved with the internal workings of a furniture shop, nor was that Court expected to understand the intricacies of this unique system of piece rate bargaining. The Court's decision vividly demonstrates that it did, in fact, wholly fail to understand those intricacies.

The Fourth Circuit's sole function was to hear arguments, read the record and the briefs and determine; thereupon, whether the NLRB's Decision and Order was supported by substantial evidence. Instead, the Court went off on a tangent, discussing the justifications offered by the Company for its contract proposals and evaluating whether those proposals constituted good faith bargaining, ignoring totally the industrial realities and the expert testimony underlying the Board's argument. It was no part of the Court's business to become involved in a *de novo* evaluation of the merits of the Company's contract negotiations with the Union or to postulate, *ab initio,* theories of collective bargaining.

In a situation where only an expert could make a rational determination of whether the Company's position represented a refusal to bargain in good faith, the Fourth Circuit Court of Appeals had, we believe, an affirmative duty to defer to the decision made by those experts.

In the *Universal Camera* case this Court expressed the narrow confines of its review of the Court of Appeals' decisions in cases involving Labor Board matters:

> "Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instances when the standard appears to have been misapprehended or grossly misapplied."
>
> *Universal Camera Corp.* v. *NLRB* (340 U.S. 474, at 491; 1951)

The Fourth Circuit's mere recitation that it denied enforcement because of a lack of substantial evidence is a transparent attempt to mask the interposition of its own theories of the merits of proposals made during negotiations involving an abstruse collective bargaining situation. This "gross misapplication" of the substantial evidence rule totally and effectively prevents operation of the National Labor Relations Act which provides: "Employees shall have the right * * * to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining * * *" (29 USC Section 157).

We seek review by this Court, not of the merits of a piece rate collective bargaining system, nor the evidentiary or credibility determinations of the NLRB but, rather, to prevent this gross subversion of the National Labor Relations Act by the Fourth Circuit Court of Appeals.

The Decisions of the Fourth Circuit Emasculate the National Labor Relations Act.

The National Labor Relations Act is being crippled in Virginia and the Carolinas, heartland of the textile industry, through the repeated denial, by the Fourth Circuit, of enforcement of National Labor Relations Board Orders.

The Textile Workers Union has often found itself before the Fourth Circuit in cases where the Union was the successful charging party in NLRB proceedings. The pattern is almost always the same: formal Complaint follows Board investigation of the Union's charges. Lengthy trial before a Trial Examiner results in a decision favorable to the Union. Reviewing that decision the full NLRB affirms the Trial Examiner's finding that violations, often flagrant, horrendous violations, of the National Labor Relations Act, have been committed.

Then the employer petitions for review and the Fourth Circuit denies enforcement of the NLRB's decision. The NLRB either refuses to petition this Court for review or actively opposes the Union's petition.

To say that it all began with *Darlington* might be to pass over our earlier treatment at the hands of the Fourth Circuit, but *Darlington* best typifies the situation from which we now seek relief. *Textile Workers Union* v. *Darlington Manufacturing Co.* (325 F. 2d 682, CA-4; vacated 380 US 263, 1965).

Disregarding the massive evidence compiled by the NLRB, the Fourth Circuit denied enforcement of the

Board's *Darlington* order. This Court, on petitions from both the Textile Workers and the NLRB, vacated that judgment and remanded to the Fourth Circuit.

The Textile Workers Union, having long urged the Fourth Circuit to follow *Universal Camera*, had brought the *Universal Camera* issue to the Supreme Court. We had believed that the *Universal Camera* principle was victorious in *Darlington*. It has been, however, a phyrric victory: Following this Court's decision in *Darlington*, the Fourth Circuit gave some initial indication that it would apply the mandates of *Universal Camera*. When *Darlington (II)* reached the Fourth Circuit after further consideration by the NLRB pursuant to this Court's remand, the Fourth Circuit majority was persuaded to enforce the Board's order. *Darlington Manufacturing Co.* v. *NLRB* (397 F. 2d 760; CA-4, 1968; cert. den. 393 US 1025). Chief Judge Haynsworth, however, in a specially concurring opinion, opened the door to the continued litigation, which is still going on, by putting in a word in advance for the Company. Admitting that "there is no occasion for us to address ourselves to (the) matter" of the duration of the back-pay period, Chief Judge Haynsworth did so address himself, inviting litigation regarding duration. Thus, despite this Court's strong mandate in *Darlington (I)* and its denial of the Company's petition for certiorari in *Darlington II*, the Darlington litigation continues, basically on the duration issue, some 15 years after its initiation by the Textile Workers Union.

The next year a divided Fourth Circuit enforced, in part, an NLRB order in J. P. Stevens III and IV after this Court had denied review by certiorari of the Second Cir-

cuit's enforcement decision in J. P. Stevens I and II. [See: *J. P. Stevens & Co., Inc.* v. *NLRB* (417 F. 2d 533; CA-5, 1969; Stevens V), summarizing Stevens I-IV].

By 1972, however, any illusion that the Fourth Circuit would honor the *Universal Camera* mandate with regard to Textile Workers Union cases had been erased. Between 1970 and 1971 the Fourth Circuit decided four Textile Workers Union cases. It denied enforcement of the NLRB's decision in three of the four. [In the instant case, and in J. P. Stevens VI and VII. See: *J. P. Stevens and Company* (190 NLRB No. 139), pending review sub nom. *Textiles Workers Union* v. *NLRB*, CA-DC (Stevens XII), summarizing Stevens I-XI]. In the last case decided by the Fourth Circuit during this period (*Craddock-Terry* v. *NLRB*, —— F.2d ——; CA-4, 1971), the Company's petition for review was so patently without merit that it had to be dismissed, *per curiam*, from the bench immediately following oral argument.

Thus, despite *Darlington*, the Fourth Circuit has refused, especially since 1969, to enforce Board orders in Textile Workers Union cases. During this period (in cases where the Textile Workers Union had filed charges and the National Labor Relations Board had found violations) the NLRB and the Textile Workers Union have suffered defeat at the hands of the Fourth Circuit 75% of the time. We cannot believe that *any* reading of *Universal Camera* would permit this 75% denial of enforcement to stand without review by this Court.

But even the initial denial of enforcement by the Fourth Circuit is not the end of this outrageous story. The Na-

tional Labor Board has consistently refused to seek review of those denials by this Court and has actively opposed our petitioning for review. In *Darlington*, two separate petitions (one from the Board and one from the Textile Workers Union) were necessary because the Board actively opposed, in part, the Union's petition, *notwithstanding* that the Union sought to raise on review the very issue which had been an alternate basis for the original Board decision. (See: *TWUA* v. *Darlington Mfg. Co.*, Memorandum for the NLRB: No. 846, October Term, 1963). Within the last two years, the Textile Workers Union has requested that the Labor Board seek review of the three decisions denying enforcement of its orders in Textile Workers cases. The Board refused to Petition in both Stevens VI and Stevens VII and filed a Memorandum in Opposition to our petition in Stevens VI, notwithstanding that the issues we sought to raise were precisely those upon which the Board gave us a favorable decision and upon which the Board itself sought enforcement before the circuit court.

The Board has advised us that it will oppose this Petition, notwithstanding the fact that it believes the Fourth Circuit made an incorrect decision. Unfortunately, the Board appears to believe that, bureaucratically, it must oppose our petition in this case. For if the Court granted Certiorari and the Board had neither petitioned for itself nor opposed our petition, the Board might well be held to have been negligent in failing to file the original Petition. Thus, we have the unhappy state of affairs where (although the Board is charged with the responsibility both of protecting the rights of workers and effectuating the purposes

of the Act), in effect, the Board is our active opponent when we seek to achieve those same ends. But we cannot permit the likelihood of Board opposition to sway us from seeking review by this Court. For this Union, also, is charged with the responsibility and the duty of protecting its members when the danger of irreparable injury is at hand, and when the decision of a lower court threatens to obliterate their meager rights.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: New York, N. Y.
February 10, 1972

APPENDIX

Opinion of the United States Court of Appeals for the Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 71-1067

Moore of Bedford, Incorporated,

Petitioner,

versus

National Labor Relations Board,

Respondent,

and

Textile Workers Union of America, AFL-CIO, CLC,

Intervenor.

On Petition for Review of an Order of the National Labor Relations Board.

(Argued September 1, 1971 Decided November 15, 1971)

Before Bryan, Craven and Butzner, Circuit Judges.

Guy Farmer (Patterson, Belknap, Farmer and Shibley on Brief) for Petitioner, and Stanley J. Brown, Attorney, National Labor Relation Board (Eugene G. Goslee, Acting General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Leonard M. Wagman, Attorney, National Labor Relations Board, on Brief) for Respondent. Alan Gordon (Patricia E. Eames and Joel Ronald Ax on Brief) for Intervenor.

CRAVEN, Circuit Judge:

This is a petition for review by Moore of Bedford, Incorporated to set aside an order of the National Labor Relations Board, and a cross-application by the Board for enforcement of its order. The Board's order is reported at 187 N.L.R.B. No. 87, and reads in relevant part as follows:

> "[M]oore of Bedford, * * * shall:
>
> 1. Cease and desist from
>
> (a) Insisting, as a condition to entering into an agreement with the Union or any other exclusive bargaining representative of its employees in the appropriate unit, upon contract provisions which would grant it the uncontrolled right to fix rates of pay for piecework unilaterally and at the same time deny to employees their rights to file grievances as to rates of pay for piecework."[1]

The Trial Examiner and a majority of the Board concluded that the Company had engaged in unfair labor practices in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (5), because, in negotiating a new contract with the Textile Workers Union of America, the Company had insisted upon the right to fix the rates of pay for new piecework and

1. The Board's order also contained the usual provisions requiring the Company to bargain collectively with the Union with respect to rates of pay, wages, hours of employment, and other terms of employment, and to embody any understanding reached in a signed agreement. In addition, on the premise that the strike was an unfair labor practice strike, the Company was required to reinstate all workers who made an unconditional offer to return to work in December 1969 to their former positions without loss of seniority and with back pay from the date of their offer.

at the same time insisted upon limiting arbitration of grievances concerning new piecework rates to the question of whether or not an employee could earn the base rate.[2] A strike followed the breakdown in negotiations and upon complaint filed by the Union, the Board determined this strike was an unfair labor practice strike rather than an economic strike, and imposed the usual sanctions.

It is unclear from the record whether or not the Company was unyielding in its insistence upon the above provision in the new contract negotiations. But assuming it did so insist, we conclude that there is not substantial evidence on the record as a whole to support the conclusion that such insistence was an unfair labor practice, and we decline enforcement to the Board's order.

I

The Company manufactures upholstered furniture and operates its principal place of business at Bedford, Virginia, where this dispute arose. The majority of employees at the Bedford Plant had traditionally been paid on an incentive piecework basis,[3] and in December of 1968, approximately two-thirds of the 130 employees were compensated in this manner. It is around the piecework employees and their compensation that this dispute centers.

The compensation for each detailed operation which an employee is called upon to perform is not constant.

2. General Counsel conceded "that in no other respect is there distinct evidence of anti-union animus or illegal conduct." App. 323.

3. By this method the amount of compensation a piecework employee will receive is determined by the combination of the rate set for each different operation he performs and the number of times he satisfactorily performs such operation.

Changes in the piece rate based on time studies and other industrial engineering techniques are not infrequent. In addition, new operations are added and old ones dropped as furniture styles change. The Trial Examiner found that the number of separate and distinct operations evaluated and fixed are about 2,000 in any year,[4] and that, "The contract had always provided that the Company could set wage rates in this fashion, and that the Union could file grievances when employees felt the rates were unfairly established, and even go to binding arbitration on the questions." *Moore of Bedford*, 76 L.R.R.M. 1182 (January 7, 1971). The 1965 contract allowed the Company unilaterally to adjust piece rates subject to the proviso that, "[S]uch change will reflect the extent of the change made," and provided that, "[A]n incentive employee . . . can . . . earn not less than twenty-five percent (25%) above the piece rate base."[5] App. at 187. At this time the piece rate base for newly set piece rates was $1.28. App. at 202. In the September 1967 extension of this agreement, the computation of the base rate was changed from 25% above the

4. At the oral argument the Company maintained that the total number of distinct operations was 2,000, but that only about 400 would be changed each year. However, the Company did have the power to change all piece rates should it desire to do so.

5. Article VI, Section 4 of the 1965 contract reads as follows:

"Piece work rates may be changed by the Employer upwardly or downwardly during the term of this agreement, due to method changes or changes in job content, provided such change will reflect the extent of the change made, and provided they will be so set that an incentive employee who is not a learner, trainee, or substandard worker can, with the exercise of incentive effort, earn not less than twenty-five per cent (25%) above the piece rate base which percentage is established differential under standard conditions."

piece rate base to a flat piece rate base figure of $1.70 per hour. App. at 206-207.

In 1968, for the first time, four grievances went to arbitration. The Company contended that Article VI, as amended by the 1967 extension, Section 4, above, should be interpreted to mean that wage grievances could be arbitrated only if piecework rates were set so that incentive employees, exerting normal effort, could not earn $1.70 per hour (the then existing piece rate base). The arbitrator rejected this view and agreed with the Union that "reflect the extent of the change made" meant that new rates would always be set so as to maintain the average wages the employees had in fact been earning, App. at 322, which varied from 41 cents above the piece rate base in 1965 to 84 cents in 1968.

Negotiations on a new contract to replace the one expiring on December 31, 1968, began on December 18, 1968. During these negotiations the Company insisted on contract provisions which would give it the power to set the rates for piece work, but would limit arbitration of grievances to the question of whether an employee, with the exercise of incentive effort, could earn the base rate.[6] The Trial Examiner found that it was the desire of the Company thereby to incorporate in the new contract the interpretation of the old contract rejected by the arbitrator.

During the negotiations the Company increased its offer on the base rate from that contained in the 1967 extension of the contract in addition to making various

6. The Company strongly urges that its last offer was a retraction of this position, and indicated a willingness to return to the old contract provision of Article VI, Section IV. In light of disposition of the case, it is unnecessary to reach this contention.

offers concerning fringe benefits, with the last base rate offer varying from $1.80 to $2.00 per hour depending on the type of job involved. However, the Trial Examiner found that the impasse between the parties and the resultant strike on January 28, 1969, came about because of the Company's adamant insistence upon its right to set piece rates and the related grievance and arbitration clause.[7] The strike lasted for about a year,[8] ending when the Union made an unconditional offer to return to work on December 18, 1969.

The Board accepted the Trial Examiner's conclusion that, "the Respondent's purpose was to remove the Union as a voice in the determination of what two-thirds of the employees would be paid for their work and indicated an insistence upon the right to set wages at will throughout the life of the contract without regard to the existence of a

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7. The provisions in question read as follows:

Article V(4)—The Company shall have the sole determination in the establishment of incentive rates. Rates may be changed by the Company upwardly or downwardly during the term of this agreement, due to changes in methods, material, equipment, job assignment, changes in the job content and the clerical errors; provided such change or changes reflect the extent of the change made; and provided that incentive rates will be so set that an employee who is not a learner, trainee, or substandard worker, can, with the exercise of incentive effort, earn not less than $1.80 per hour.

Article V(5)—The grievance procedure, including arbitration, of the disputes arising under this Article, shall be limited to determining whether or not the Employee is getting the hourly rate for the job; or in the case of piece workers, whether the Employee can, with the exercise of incentive effort, earn not less than $1.80 per hour. 76 L.R.R.M. at 1182.

8. The Company and the Union disagree as to which one actually broke off negotiations and also with regard to events during the strike, but the record supports the Board's resolution of these issues.

bargaining agent or spokesman for the employees." 76 L.R.R.M. at 1183. We think that the record does not support this conclusion.

We agree with the Board that an employer is bound to discuss wages and bargain about them in good faith. However, we do not agree that the insistence upon its proposed Article VI, Sections 4 and 5, amounted to a refusal to bargain about wages. It is clear that the Company never refused to negotiate the base rate. Therefore the insistence upon limiting the arbitration and grievance procedure to whether or not the base rate could be earned was not to insist upon the right to set wages unilaterally throughout the life of the contract.

The Company contends that its proposed Article VI(5) does not limit the filing of grievances or negotiation about individual piece rates, but only restricts binding arbitration to the question of whether the base rate could be earned. The Trial Examiner, however, found that this article would mean, "[T]he total exclusion of the piece rate setting prerogative reserved to the employer from grievance and arbitration." App. at 333. The Examiner's interpretation seems an unlikely one in view of the established tradition with respect to piece rates and the history of harmonious relations between this Company and the Union. But whether or not subject to grievance procedures, it is doubtless true that this clause would have given the Company the power to lower all wages to the base rate by simply setting unreasonably low individual piece rates. It is this power coupled with the limitation on binding arbitration which seems to have been determinative for the Trial Examiner and the Board.

The Trial Examiner concluded that the base rates proposal by the Company bore no relation to what the employ-

ees had been earning and that the Company, although willing to pay its piecework employees more than the base rate, adamantly refused to contract to do so. The Board agreed and concluded that it was the piecework incentive rates which actually established the real wages of the piecework employees, and that by having the power to set low piece rates and thus lower rates of pay to the base rate, the Company was in reality insisting upon unilateral control over wages since its proposed rates were, in the Board's view, so low as to be meaningless.

What the Board and the Trial Examiner seem to have overlooked is that the Company was not adamant that the base remain at the 1965 figure of $1.28 plus 25%, the 1967 figure of $1.70, the Company's initial negotiating proposal of $1.80 per hour, (*see* page 7 note 8 *supra*) or even its subsequent offer of $2.00 as to some classification. Regardless of whether or not the base rate figures advanced by the Company were such a low rate of pay as to be meaningless[9] in light of what the employees had earned and what they expected to earn, the record discloses that the Company at no time refused to negotiate this base rate. The last offer made by the Company was a base rate which varied from $1.80 to $2.00 depending on the employee classification. Nowhere does it appear that this was a final non-negotiable proposal. Furthermore, it seems that this proposal was the last one only because the Union voted to strike shortly after it was made. In short, there is simply no evidence

9. There is real conflict regarding the difference between the base rate and what the employees were earning. The Board contends that the average earnings of the piecework employees was $2.35 an hour. The Company points out that this average is a composite of classifications, and in some classifications the average earnings were $2.19 per hour, $2.24 per hour and $2.28 per hour.

that the Company refused to negotiate the base rate. The Company did insist upon a unilateral initial determination of piece rates—not at all unusual in the industry. However, if the base rate were raised sufficiently, the Company would not have unilateral *control* over wages, even assuming arguendo that the Board was correct in its assertion that the average earnings of the employees represented the actual wages of the employees around which bargaining had to center. The idea that the Company was refusing to bargain about wages merely by insisting upon its proposals, independent of what the base rate was, is untenable because the Board's theory depends upon the base rate being so low as to be meaningless. Therefore, we find that the Board's conclusion that the Company refused to bargain about wages is not supported by substantial evidence.

II

In the context of these negotiations, the Board's order, while couched in general negative terms, actually requires the Company either to abandon its proposed contract provision and accept the old contract provision as interpreted by the arbitrator or to accept straight hourly wages for all employees. Even if the Company had actually refused to bargain realistically about wages, which it did not, we think that the Board's order would violate Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d)[10]

10. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

because, under the circumstances of this case, it actually required the Company to agree to a substantive contractual provision of a collective bargaining agreement. This the Board was without power to do. *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970), *Tex Tan Welhausen Co.* v. *N.L.R.B.*, 434 F. 2d 405 (5th Cir. 1970). However, in light of our conclusion that the Company did not refuse to bargain about wages, the Board's order is defective for the more fundamental reason that the conclusions upon which it is based are not supported by substantial evidence.

ENFORCEMENT DENIED.

Decision and Order of the National Labor Relations Board

187 NLRB No. 87

D-4358
Bedford Virginia

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 5-CA-4324 and 5-CA-4599

MOORE OF BEDFORD, INCORPORATED

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

On June 29, 1970, Trial Examiner Thomas A. Ricci issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions, as set forth in the Trial Examiner's Decision. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision and supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The

Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified below.[1]

We agree, for the reasons set forth in the Trial Examiner's Decision, that the Respondent by its adamant position in its resolve to change article VI section 4, which provided for a grievance-arbitration procedure in regard to the establishment of incentive rates, violated Section 8(a)(5). In our opinion the record and the course of bargaining support the Trial Examiner's conclusion that the Respondent's purpose was to remove the Union as a voice in the determination of what two-thirds of the employees would be paid for their work and indicated an insistence upon the right to set wages at will throughout the life of the contract without regard to the existence of a bargaining agent as spokesman for the employees.

We find no merit, contrary to our dissenting colleague, in the position that the Respondent was merely attempting to permit itself greater flexibility in changing rates so long as a specified earning level was maintained, and that its adamant position in this regard was motivated solely by a willingness to negotiate over the earnings level rather than subject itself to possible arbitration over the approximately 2,000 separate piece-rate changes generally made each year. The record shows that most employees were paid far more than the so-called established "specified earning level" and that the average rate of pay for the

1. The Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

employees in question well exceeded such base rates. Thus, it was in fact the incentive rates, not the base rates, which established the employees' pay.[2] Accordingly, it is clear that while the impasse appears to have occurred over grievance machinery rather than unilateral control of wages, and the Respondent's apparent hard bargaining appears to be directed only at the grievance-arbitration provision, the Respondent's position carried with it unilateral control over the effective wages which would be paid to the incentive pay employees. The insistence on bargaining such a provision to an impasse by a Respondent has previously been held by the Board to be violative of Section 8(a)(5).[3]

Nor do we find support for the contention that it was the Union rather than the Respondent which chose to create the impasse over the Respondent's proposal to eliminate the grievance-arbitration machinery. In our view the record fully supports the findings of the Trial Examiner that the

2. More specifically in this connection, we note that, contrary to the terminology of the dissenting opinion, the Respondent at no time indicated a willingness to negotiate over the "earnings level" of its employees. Rather, it insisted at all times that the contract provide only a basic hourly rate of $1.70, which as noted, in no way reflected the actual earnings level of its employees, with the Union being permitted to grieve or proceed to arbitration if the incentive rates adopted unilaterally by the Respondent produced earnings of less than $1.70 per hour. Indeed retention of article VI as in the old contract but with the other modifications sought would have had the same effect. Under these circumstances, it cannot be said that the Respondent was bargaining in good faith concerning the "earnings level" and, in fact, it appears that the Respondent's aim was to remove the actual level of earnings from the area of collective bargaining. That this is so becomes more apparent when it is recalled that the Respondent was seeking to avoid an arbitrator's award holding that such earnings level was arbitrable.

3. *Tex-Tan Weldhausen Company*, 172 NLRB No. 93, enfd. 410 F. 2d 1265 (C.A. 5), judgment vacated and case remanded to circuit court 397 U.S. 819, reaffirmed in relevant part F. 2d (decided November 5, 1970).

Respondent never receded throughout the bargaining from its position that the expired contract was intended to restrict arbitration to the base wage rate and that the Respondent's entire purpose was to assure that it would not be limited in its setting of incentive wages. We find no factual basis for concluding that the Respondent ever receded from this position.

As the dissent correctly emphasizes, the Union was indeed insistent throughout on retaining the right to arbitrate the effect of piece-rate changes, and was not open to any compromise on this issue. Both logic and the record indicate that if the Respondent had in fact offered at any time to continue the expired contract's provisions regarding piece rates, as contended in the dissent, there would have been no basis for disagreement. As it turned out, the Union went on strike for almost a year to attempt to get the Respondent to change its fixed position in this regard. In the circumstances, we do not think it significant, therefore, that the Union did not discuss the "alternative" proposal before the strike, since the strike proposal in no way changed the Union's basic position of wanting to preserve the right to arbitrate piece rates, and would have made no change in the attitudes of the union members.

Nor do we find any significance in the fact that the Union had negotiated an almost identical clause to the one propsed by the Respondent, and so firmly resisted here, at another employer's plant. The record shows that at the other plant it was a first contract, and, unlike the instant situation, there was no long-established background of bargaining in which arbitration of earnings levels had become an accepted part of the contractual relationship. It was not the mini-

mum base rate, but the average earnings received under the incentive system here which the Union considered as the wage rate, and an integral part of the wage structure. And indeed this was how the contract was interpreted in a series of arbitration awards. Accordingly, we do not think that because the Union willingly agreed to a provision, resisted here, in a different bargaining situation with another employer that the Union was thereby bound to waive its right to bargain over wages.

The Remedy

We agree with the Trial Examiner that to remedy the Respondent's unlawful refusal to fulfill its statutory obligation that it be required, on request, to bargain with the Union, as the exclusive representative of its employees in the manner set forth in the Trial Examiner's Recommended Order. We also agree with the Trial Examiner that the strike which started on January 28, 1969, was an unfair labor practice strike and that the strike made an unconditional offer to return to work in December 1969. However, the Trial Examiner apparently inadvertently failed to provide a remedy. Accordingly, in addition to the remedy set forth in the Trial Examiner's Decision, we shall also order that, in the event the Respondent has not done so, the Respondent reinstate such strikers to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, dismissing, if necessary, any employees hired to replace them. We shall also order that in the event of Respondent's refusal to reinstate them upon their December 1969 request, that the Respondent make whole those discriminates, by payment

to each of them a sum of money equal to that which they would normally have earned as wages from 5 days after the date on which application was made for reinstatement to the date of the Respondent's offer of reinstatement, such loss to be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest at the rate of 6 percent per annum to be added to the backpay and to be computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as herein modified, and hereby orders that Respondent, Moore of Bedford, Incorporated, Bedford, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order as modified below:

1. Add the following paragraphs 2(b), (c), and (d) to the Trial Examiner's Recommended Order and reletter subsequent paragraphs accordingly:

"(b) Offer to the employees who made an unconditional offer to return to work in December 1969 reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the section of this Decision entitled "The Remedy," dismissing, if necessary, any employees hired to replace them, and make each of them whole for any loss of pay suffered by them as a result of its

failure to reinstate them within 5 days after their unconditional application, with interest thereon at 6 percent.

"(c) Notify immediately the above individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

"(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and appropriate to facilitate the checking of the amount of backpay due and the reinstatement rights of the employees involved."

2. In footnote 3 of the Trial Examiner's Decision substitute "20" for "45" days.

3. Substitute the attached Appendix for the one attached to the Trial Examiner's Decision.

Dated, Washington, D. C. January 7, 1971.

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

Member Miller, dissenting:

I would not find an 8(a)(5) violation on the facts of this case. The negotiating problems arose out of a preexisting dispute between the parties under the old contract as to whether employees had a sort of vested right in existing piece rates or whether the somewhat ambiguously drawn provisions of that agreement were intended only to guarantee a certain earnings level and to leave the Company free to change rates so long as earnings opportunities did not fall below a contractually prescribed level. A series of arbitration disputes were decided adversely to the Company's contention. As a result, in the next negotiation the Company proposed to revise the contract language so as to permit it greater flexibility in changing rates so long as a specified earning level was maintained. It expressed a willingness at various points in the negotiations to negotiate over the earnings level but was firm in its position of wanting to take this approach rather than to submit to possible arbitration each adjustment, pointing out that there were as many as 2,000 separate piece rates in its structure although there were only about 130 production and maintenance employees.

The decision of the Trial Examiner rests upon the theory that the Employer was attempting to insist upon unilateral action in an area where he is not entitled, under the law, to have unilateral rights and that he insisted upon this presumably nonmandatory subject of bargaining to a point of impasse.

In my view, he erred, both as to the facts and as to the law.

ceived with them, although he testified that the alternative proposal had never been withdrawn prior to the strike.

It appears, therefore, that the strike began without any full exploration of available alternatives. It is difficult under these circumstances to find that any impasse existed at this point, or that the Company had created any impasse which could be said to have existed.

Bargaining meetings continued during the strike, during which it again appears that the impasse, if any, was created by the Union. Thus, on March 6, although other issues still remained unresolved, the union representatives indicated that he stated to the Company's negotiators, "that this [the piece rate arbitration issue] was the key issue and that it had to be resolved . . . before it would be possible to proceed to a discussion of the other open issues." And in May, when a Federal mediator suggested that only disagreements of grievances be taken out of the arbitration procedure with the understanding that the no-strike clause would not bar strikes over such disputes during the contract term, the Union, after considering this alternative at length, stated that the Union could not agree to this alternative. While the Company also indicated it did not look favorably upon such a proposal, it would seem obvious that the Union which made the initial response was certainly as adamant, if not more so, than the Company and it is difficult to blame any impasse on the Company, if indeed the brief exchange over this alternative can be regarded as having created an impasse.

It is necessary, in assessing the entire conduct of both parties, to recognize that the record shows that an almost

identical clause to the one proposed by the Employer had been accepted by this same Union at another employer's plant—Craddock Terry. It is also significant that this dispute arose after 20 years of what the Trial Examiner refers to as "amicable and fruitful collective bargaining" between the Respondent and the Union.

All facts considered, it appears to me that the parties both engaged in good faith bargaining, but were unable to resolve an important issue. Both parties "stood on principle." That may not produce a contract, but neither does it violate our Act. I would therefore conclude that this is not a case in which a finding of 8(a)(5) violations should appropriately be made.

Dated, Washington, D. C., January 7, 1971

Edward B. Miller, Chairman

National Labor Relations Board

APPENDIX

Notice to Employees

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT insist, as a condition to entering into an agreement with Textile Workers Union of America, AFL-CIO, or any other exclusive bargaining representative of our employees, upon contract provisions which would grant us the uncontrolled right to fix rates of pay for piecework unilaterally and at the same time deny to the employees their right to file grievances as to rates of pay for piecework.

WE WILL offer to the employees who made an unconditional offer to return to work, reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any employees hired to replace such employees, and WE WILL make each employee whole for any loss of pay suffered by them as a result of our failure to reinstate them within 5 days after their application.

WE WILL bargain collectively with Textile Workers Union of America, AFL-CIO, as the exclusive representative of our employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understnding in a signed agreement.

The bargaining unit is:

All production and maintenance employees in our Bedford, Virginia, plant, excluding office clerical employees, watchmen and supervisors as defined in the Act.

MOORE OF BEDFORD, INCORPORATED

(Employer)

Dated By

(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 1019, Charles Center, Baltimore, Maryland 21201, Telephone 301-962-2822.

Trial Examiner's Decision

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS

Washington, D. C.

Cases Nos. 5-CA-4324, 5-CA-4599

MOORE OF BEDFORD, INCORPORATED

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

STATEMENT OF THE CASE

THOMAS A. RICCI, Trial Examiner: A hearing in the above-entitled proceeding was held before the duly designated Trial Examiner on March 18 and 19, 1970, at Bedford, Virginia, on complaint issued by the General Counsel against Moore of Bedford, Incorporated, herein called the Respondent, or the Company. Separate charges were filed on February 27 and December 22, 1969, and the final complaint issued on February 9, 1970. The question presented is whether the Respondent refused to accord proper recognition to the Textile Workers Union of America, AFL-CIO, herein called the Union, and thereby violated Section 8(a) (5) of the Act. Briefs were filed by the General Counsel and the Respondent.

Upon the entire record and from my observation of the witnesses, I make the following:

Findings of Facts

I. The Business of the Company

The Respondent is a Virginia corporation with its principal place of business in Bedford, Virginia, where it is engaged in the manufacture of furniture. During the last 12 months, a representative period, it received revenues in excess of $50,000 for products which it sold and shipped directly to points located outside the Commonwealth of Virginia. I find that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to exercise jurisdiction herein.

II. The Labor Organization Involved

I find that Textile Workers Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The Issue

After 20 years of amicable and fruitful collective bargaining the Respondent and the Union started negotiations late in 1965 for a new agreement to replace an expiring

[1] A post-hearing motion by the General Counsel to correct an obvious misprint in the complaint and certain typographical errors in the transcript is granted.

one. Many proposals and counterproposals were exchanged, agreement was reached on a number of items, but the parties came to an impasse over the Company's desire to alter certain language with respect to the method for settling piecework wage rates and its related grievance and arbitration provision. The relevant clauses which the Respondent proposed and adamantly insisted upon, are set out verbatim in the complaint, and it is alleged it was unlawful for the Company to have insisted upon their acceptance.

There was a strike over this issue, and the complaint goes on to allege it was an unfair labor practice strike. As a separate item, the complaint also alleges that the Union one day unconditionally offered to return all the strikers to their jobs and that the Respondent refused them reinstatement. The Respondent denies the assertion of an unconditional offer to return.

The essential argument against the Company is that it wanted the Union to agree that it, the Company, should be free to set piecework wage rates during the life of the contract however in its judgment it thought proper, while the Union surrendered, in writing, any right to question the correctness of the changing rates, to file grievances about them, indeed, to talk with management about them at all. Chief among the defense contentions is the assertion that because the number of specific piecework rates to be set is very great, too much "management and employee time" would be "tied up" if the Company has to discuss the rates with the Union, that all this would be disruptive of the "process of manufacture." No attempt was made

to explain why the many grievances over these same rates had presented no unsurmountable problem in the past. The Respondent also disputes the allegation that it insisted upon the arrangement to improve. There is further defense advanced rather obliquely, that one Company really desired and had a right to insist upon, a reduction in the earnings of the employees.

The Facts: Negotiations

With about 130 production and maintenance employees the Company manufactures upholstered furniture one-third of the employees are hour-paid and the other two-thirds are paid at incentive piecework rates, the price for each detailed operation always emerging as "set by time-study and methods-industrial engineering techniques and as required by the ever-changing styles of furniture. The number of separate and distinct operations evaluated and fixed total upwards of 2,000 in any given year. The contract has always provided that the Company could set piecerates in this fashion, and that the Union could file grievances when employees felt the rates were unfairly established, and even go to binding arbitration on the questions. There was always a minimum earning guaranteed piece rate work employees, the contract signed in 1963 set it at $1.28 per hour plus 25 percent; a 1967 addendum to the agreement raised the minimum amount to $1.70 per hour.

There were many grievances filed over the years with respect to this setting of the piece rates and all were adjusted. In 1968 the first time in the Company's history

four such disputes were taken to arbitration. And the question to the arbitrator, of course, was whether the rates at issue had been set in accordance with whatever the then current contract provided on the subject. Like all other contracts dealing with incentive piecework rates, and perhaps inevitably because of the nature of the subject, this one too left much to be desired in its lack of clarity and precision. The Company argued the arbitrator must look to the minimum rate guaranteed, $1.70 per hour, and that so long as the employee in the end earned that much per hour worked, that was all he could demand. The contract said nothing else about money, and if in the past the employees had grossed more than that on the average, it meant only that the Company had not set the rates correctly; somewhat generously above its contract obligations, or that the employees had worked with commendable diligence. The contention was based upon the following provision of the existing contract: "New piece rates shall be so fixed that an employee who is not a learner, trainee or sub-standard worker can, with the exercise of incentive effort, earn not less than twenty-five percent (25%) above the piece rate base of $1.28." After all, according to the Company, the entire purpose of an incentive wage system is that the employees should be encouraged to earn more, with consequent greater production, and profit, to the employer.

The Union took a different view. It argued it was the intent of the contract as a whole that new rates would always be set so as to maintain the average wages the employees had in fact been earning, that they should com-

pare in this sense to existing rates in comparable operations. It rested its position on the following language of the contract: "Article VI, Section 4. Piecework rates may be changed by the Employer upwardly or downwardly during the term of this agreement, due to method changes or changes in job content, provided such change will reflect the extent of the change made, and provided they will be so set that an incentive employee who is not a learner, trainee, or substandard worker can, with the exercise of incentive effort, earn not less than twenty-five percent (25%) above the piece rate base, which percentage is the established differential under standard conditions." And in further support the Union pointed to the fact that for several years the employees had in fact earned considerable above the minimum guaranteed amounts. For the year 1965 the average earnings of piece rate workers was $2.11 per hour; from September 1966 to June 1967 it was $2.44 per hour; and for September 1968 to November 30, 1968, it was $2.54 per hour. These figures are calculated by averaging the average earnings in each of eight classifications or categories of employees, recognizing that there may be a greater number of employees in one category than in another.

On this disagreement the true issue taken to arbitration, the arbitrator agreed with the Union. He did not determine what rates would have been proper in the specific four grievances used as vehicles to put at rest the major question, but asked the parties instead to settle them amicably on the basis of his decision as to how the contract should be read. They did, and in consequence one employee was paid several hundred dollars.

With their contract by its terms due to expire on December 31, 1968, the parties started negotiations for renewal in November. There were a number of meetings in November, December, and January, many proposals were exchanged, in writing and orally, economic and otherwise. There would be no point in detailing what all these matters involved, what items were agreed upon and what remained unresolved. The Company made clear during the conferences, and as candidly admitted at the hearing, that one of its objectives was to so change the contract that in future any dispute over the setting of piecework rates would be decided on the basis of its reading of the earlier contract, the view that had been rejected by the arbitrator. Indeed its insistence always has been that the arbitrator erred, that even the old contract made the minimum guaranteed earnings the true and final test as to the correctness of later setting of rates. Be that as it may, the government asserts that it was this issue, on which the Company never receded, that caused the strike, and that all the other matters discussed have nothing to do with this case. The General Counsel said on the record the issue is a relatively narrow one and indicated that if there was nothing wrong with the Respondent's adamant position in its resolve to change Article VI, Section 4, of the old contract, the complaint must be dismissed, for in no other respect is there direct evidence of antiunion animus or illegal conduct. It would also follow, in that case, that the strike was a purely economic one.

Moreover, although the Respondent altered the phrasing of its critical proposal from time to time in the effort to

persuade the Union to accept it, the variances in language are of no moment, and therefore need not be spelled out in detail here. It is clear that the one set out in the complaint in substance reflects the issue involved to the extent that anything the Respondent proposed in writing shed light on this proceeding.

It reads as follows:

> Article VI (4)—The Company shall have the sole determination in the establishment of incentive rates. Rates may be changed by the Company upwardly or downwardly during the term of this agreement, due to changes in methods, materials, equipment, job assignment, changes in the job content and the clerical errors; provided such change or changes reflect the extent of the change made; and provided that incentive rates will be so set that an employee who is not a learner, trainee, or substandard worker, can, with the exercise of incentive effort, earn not less than $1.80 per hour.
>
> Article VI (5)—The grievance procedure, including arbitration, of the disputes arising under this Article, shall be limited to determining whether or not the Employee is getting the hourly rate for the job; or in the case of piece workers, whether the Employee can, with the exercise of incentive effort, earn not less than $1.80 per hour.

Impasse: The Strike

A bargaining session took place in the morning of January 28, 1969; the employees went out on strike that afternoon. The Respondent took pains to prove the Union had authorized the strike. Its reason was because the Union's

30-day notice of dispute to the Federal Mediation and Conciliation Service, as required by Section 8(d)(3) of the Statute, had not been given until January 7, 1969. Wayne Dernoncourt, Director of the Union, tried to hold back on this question, but the record shows clearly the Union did authorize the strike that day, and I so find. As will appear below, the Respondent contends that because the strike constituted a technical violation of Section 8(d) by the Union, it, the Respondent, was in no event obligated to reinstate any of the strikers when late in the year they offered to return, conditionally or unconditionally. That matter goes to the duty to reinstate returning unfair labor practice strikers and will be discussed below.

The impasse between the parties, and the resultant strike, came about because of the Respondent's adamant insistence upon its piece rate setting and related grievance and arbitration clause. John Boardman, the company president, who was present at the January 28 meeting, testified the conversation "revolved around the fact that there was very little point in discussing anything unless we would clarify this issue of arbitration and the Union never even discussed, to my knowledge, or pursue our proposal." As Dernoncourt recalled: "The meeting centered around the discussion on the earnings of piece rated employees and that the Company's proposal limited the arbitrability of piece rates in the event they were reduced." In the words of the Company's lawyer, who was also present, the disagreement was "over whether or not Mr. Boardman had said he would not cut rates and Mr. Boardman had

said * * * stated that he has said and there was a little argument back and forth on that. And then Mr. Boardman did go on and explain in some detail, really in great detail, why the constant exposure, unlimited exposure, to the arbitration of some two thousand rates could hamstring the operation of the Company * * *." And when the employees gathered to decide a course of action during the noon hour, and voted to strike, "There was a motion put on the floor by one of the members that the Company's position hadn't changed on the clause that was disturbing them or giving them the right to cut wages and they didn't see any use."

The same single refrain ran through the post-election meetings aimed at settling the strike. Uncontradicted testimony by Dernoncourt as to a February 5 meeting: "* * * both parties agreed that this was key [sic] that would unlock the situation. That as long as the position on Article Six, Sections four and five, that we couldn't, settlement was very * * * almost impossible." The Union proposed "that if the Company would give us in writing assurance that employees' average earnings would not decrease as the result of new rates set by the company on new styles, that we could solve the issue." The Company refused. On the 20th Dernoncourt offered an agreement whereby only unresolved grievances could be arbitrated "under the same procedure that the arbitrator had ruled prior in his case." At a March 6 meeting, still attempting to break the deadlock, the Union suggested "we would negotiate a straight hourly rate for these employees." Finally, on May 13 the Union again proposed "putting

expected average hourly earnings in the article, a straight hourly rate." At one point the Union even offered to accept the revised Article VI in return for freedom to strike during the life of the contract. All this the Company rejected. The testimony of its own witness supports the finding that it was this sole question that provoked the strike. Cutler Mason, the industrial engineer, said that at one meeting after the strike the Union "established the position that Article Six was the difficult point and there was no use discussing any other issue, economic or otherwise, until this was resolved." The witness also recalled talk of a moratorium, suggested by a mediator, all other parts of the contract to take effect and the sole issue of rate setting and their arbitration held in abeyance for a fixed period. No dice.

Whatever its demand was, the Respondent pushed it to impasse. In its brief the Company points to a document received in evidence as proof that it offered to withdraw the demand to limit the area of arbitration, evidence which it says now precludes any finding that it insisted upon the proposal too forcefully. The Company made certain alternative proposals at a meeting on January 6, 1969, and to assure that the employees understood the idea reduced it to writing for their consideration. The document was distributed to the employees, they discussed it at a meeting on the 9th, and voted to reject it. The document reads as follows:

MEMO TO: ALL EMPLOYEES

SUBJECT: ALTERNATE COMPANY ECONOMY OFFERS ON CONTRACT NEGOTIATIONS

After many, many sessions and long, continuous study and bargaining, the company offers are spelled out in this letter.

There have been certain agreed on changes in the main body of the contract, but with the exception of Article 6, we shall here only describe the company's monetary proposals. (Although agreement to the monetary offers must mean agreement to the main body changes.)

These offers are retroactive to contract date of agreement (January 1, 1969) only through Monday, January 6, 1969. Otherwise, as directed by the Bargaining Committee and company, the old contract shall be in force.

First Alternate Proposal:

The first alternate proposal is for a three year contract. The change in Article 6 centers around the opportunity for incentive or piece work people to earn not less than the job rate for the job, where heretofore, (in the present contract) it is stated that the incentive or piece work operators will have the opportunity to earn not less than $1.70 per hour. Since the proposed job rates are: Upholsterers, except Outsiders, $2.00; Cutters, Sewers, and Outsiders $1.90 and all other incentive workers $1.80.' This is understood to mean that the point of acceptable or non-arbitrable earnings would be these job rate values rather than the present $1.70. The piece work guarantee however, will still be at $1.70.

Hourly Paid Employees: The offer for hourly paid employees is an additional .08 cents per hour effective, now, and an additional .07 cents per hour effective 7/1/70.

Incentive Rated Employees: The company offer is an additional 3% now, and an additional 2½% effective 7/1/70.

Insurance: The company offer is an additional $500. Life Insurance (to $2500) effective now, and an additional $500. Life Insurance (to $300) effective 7/1 70.

Hospital Room & Board: The company offer is an increase to $20 per day for an employee and dependents effective now and increasing to $22 per day for an employee and dependents effective 7/1/70. The remaining benefits (Hospital Extras-80%; Doctor's Visits-$4.00; Surgical-$375.00; Weekly Accident and Sickness-$25.00; Major Medical-to $10,000) remain the same. The weekly premium contribution by the employee having one or more dependents will be $1.00. As before, the premium for the employee will be paid by the company.

Second Alternate Proposal:

This offer by the company is for a 2 year contract and with the exception of some mutually agreed on main body changes, the contract *including the aforementioned Article 6*, remains in its present form.

Hourly Paid Employees: The company offer is an additional .06 cents per hour effective now and an additional .06 cents per hour effective 1/1/70.

Incentive Rated Employees: The company offer is an additional 3% effective now.

Insurance: The company offer is an addition to Hospital Room & Board daily benefits to $22 per day for employees and their dependents effective now. The other benefits, (Life Insurance-$2000; Hospital Extras-80%; Doctor's Visits-$4.00; Surgical-$375.00; Weekly Accident and Sickness-$25.00; Major Medical-to $10,000) remain the same. The weekly premium contribution by the employee having one or more dependents will be $1.00. As before, the premium for the employee will be paid by the company.

With regard to incentive rates: There will be no comparisons used in establishing of piece rates, and grievances on piece rates or incentive rates will be processed one at a time.

In either offer the following conditions hold:

(1) The packers (boxers) will be put on an incentive plan but will receive the offered hourly increases until that time.

(2) The cutters will have the benefit of working on a direct incentive plan, but will receive the offered hourly increases until such time as the plan is arranged.

(3) The finishers will revert to (agreed to) plant wide guarantee and job rate, from their present *temporary* guarantee and job rate.

(4) Piece work increases offered by the company will not apply to (a) bag sewing, bench tufting, or cushion stuffing rates (b) Miscellaneous pay (cleaning tables, changing tanks, etc.) (c) Sewing services or cutting room bonuses.

(5) Finishing and Cushion Fabricating increases *will be* adjusted upward to reflect agreed to piece work increases offered by the company.

(6) A training rate of $1.85 per hour computed on a weekly basis (or individual piece rate earnings whichever is higher) will be given for the first 480 hours of employment or transfer, in order to encourage new upholsterers and cover sewers to learn the job.

Inartful as the wording of the Second Alternative Proposal may have been, clearly it was intended to suggest that the Company's proposed revision of Article VI would be included in that proposal too, and not extension of the clause as it had stood in the expiring contract. There is no question this is how the Union and the employees understood it; and that this is how the Company knew they understood it. All that happened thereafter, as detailed above, confirms the conclusion. On this point the most significant circumstance is that nothing was said to indicate the Company ever receded from its position that the old contract was intended to limit arbitration, and that the Company's entire purpose was to assure that there would not again be an arbitration decided on the same basis as in the past. And finally, no mention of such a proposal—radically departing from all the Company said before and after the strike—was made on the very day that the employees voted to quit work.

Analysis and Conclusion

Two realities of industrial relations must be kept in mind at the outset.

(1) An inherent aspect of any timestudy method for setting incentive piecework wage rates is that the employer

acts unilaterally when it fixes rates in the continuously changing process of production. The contract has always so read in this case too: "Piece work rates may be changed by the Employer upwardly or downwardly during the term of this agreement * * *." And any question of fairness or unfairness that may arise, ordinarily, as in this case also, are resolved by the grievance procedure. This is an established method of doing business, it has never been held unlawful, and unless it be proscribed, must be deemed perfectly proper in this plant also.

(2) Wages go to the heart subject matter of any collective-bargaining agreement, and no citation of authority is necessary to support the cardinal rule of law that the employer is duty bound to discuss them, to bargain about what they shall be, with the employees' bargaining representative. When the wages are fixed in the contract—as in the usual case of hourly pay, or predetermined piecework compensation—he discusses them with the union, and, as agreed by the parties, the wages are written into the contract. When he sets them after the contract has been signed—because he chooses to utilize a timestudy incentive method to determine constantly changing piecework rates—he bargains about them when he sets them, or immediately thereafter if the bargaining agent for any reason believes they are wrong, either because his method violated the rules set out in the contract, or because the contract is silent on the subject and the union deems them unfair. But be it before or after the agreement is signed, bargain about them he must, and the fact the employer uses a timestudy engineering method does not alter the rule of law. (*N.L.R.B.* v. *Berkley Machine Works*, 189 F. 2d 904 (C.A. 4).

When the critical phrases in the contract proposal, without which the Respondent would in no circumstance sign any agreement, are considered together with the reality of what the current wage rates were and what the Company intended them to be in the future, the conclusion is inescapable that its purpose was to remove the Union as a voice in the determination of what two-thirds of the employees would be paid for their work throughout the life of the contract. It all starts with exclusive power in the Respondent to fix the rates: "The Company shall have the sole determination in the establishment of incentive rates." The first of the two proposed clauses, Article VI(4), ends by guaranteeing that experienced workers would "earn not less than $1.80 per hour." In arguing that this guaranteed amount is all the Union could talk about in future grievances, all it could ever insist had been agreed upon as wages, the Respondent reads the contract as though $1.80 an hour were the contractually established regular wage. It was not, as the contract reads, and it was not intended to be. In fact, $1.80 per hour, as then proposed, and $1.70 per hour, as set out in the expiring agreement, bore no relationship to what all these employees had long been paid and what they were going to be paid in the future.

Between the opening phrase—giving the Company the right to set the rates—and the closing one—setting the $1.80 minimum—the proposal admitted the Company's obligation to consider "changes in method, materials, equipment, job assignment, changes in the job content and the clerical errors," when it did alter piecework rates. And it was in keeping with that provision, also found in the past contract, that the actual earnings of the employees had

for years been far in excess of the floor amount always written into the agreement; it averaged about 40 cents per hour more in 1965, 74 cents more in 1967 and 85 cents more in 1968. And while there is indication the Company looked forward to bringing about some reduction in these average earnings, it is absolutely clear there was no intent to pay the employees anything comparable to the minimum rates. Not only did the proposals themselves say changes in rates must continue to bear a relationship to "changes in job content," but the Respondent's bargaining representatives kept telling the union negotiators no reductions in take-home pay would occur. The company president even offered a side letter to that effect. Moreover, at the hearing the Respondent reaffirmed its intent to pay in excess of the minimum stated in its proposed contract.

It is in the light of these facts that the second clause proposed, Article VI(5), must be evaluated. It provides that "The grievance procedure, including arbitration, * * * shall be limited to determining * * * whether the employee [pieceworkers] can * * * earn not less than $1.80 per hour." This means nothing less than total exclusion of the piece rate setting prerogative reserved to the employer from grievance and arbitration. Restated, it directly bespeaks insistence upon the right to set wages at will throughout the life of the contract as though there existed no bargaining agent as spokesman for the employees. Throughout its brief the Respondent does not contend otherwise. The affirmative defense that it would be too much trouble for the Company to be bothered with the Union on matters of this kind has no merit.

It matters little whether what the Respondent demanded of the Union be described as a contract unacceptable "by a self-respecting union," *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131 (C.A. 1), or agreement upon a non-bargainable issue, *N.L.R.B.* v. *Wooster Division of Borg-Warner*, 356 U.S. 342. To insist to the point of impasse that a union remove itself as the bargaining agent in so broad and significant an area of collective bargaining is not good faith bargaining as required by the Statute. As the Board stated in *Alba-Waldensian, Inc.*, 167 NLRB No. 101, "Its [the employer's] insistence upon retaining the right unilaterally to control during the contract term an item as vital to an agreement as wages appear to us * * * the clearest manifestation of bad faith." In *L. L. Majure Transport Co.*, 95 NLRB 311, the employer, among other restrictive contract proposals, insisted upon "the right * * * to increase or decrease wages unilaterally" while denying "establishment of a grievance procedure," and the Board characterized the position as "proposed shackles for the Union, while reserving unrestrained freedom for itself. Such a contract, if entered into, would have amounted to a formal negation of the collective bargaining principle."

A more directly analogous situation was presented in *Tex-Tan Welhausen Company*, 172 NLRB No. 93, where the posed contract contained no base rate in dollars and cents but provided only for the usual nebulous timestudy engineering concepts for setting ever-changing piecework rates. The Board's holding was: "It is found that by insisting upon a contract which would grant it the uncon-

trolled right to fix rates of pay for piecework unilaterally and would deny to the employees their right to file grievances as to rates of pay for piecework Respondent refused to bargain in violation of Section 8(a)(5)." I am unable to distinguish that case, in principle from the one at bar merely because the Respondent here offered to agree to minimum base pay in fact bearing no relationship to the pay which its employees had always received and which it was clearly intended they should continue to be paid.

I find, in the circumstances of the record as a whole, that by insisting to impasse upon the Union's acceptance of its proposed contract Article VI(4) and (5) the Respondent refused to bargain in violation of Section 8(a)(5) of the Act.

The September 16, 1969, Meeting

The strike was still in progress in September. On December 18, 1969 the Union told the Company without equivocation that the strike was over and all strikers wished to return to work. The complaint alleges there was an unconditional offer to return all the strikers, both on September 16 and on December 18, and that in each instance the Company unlawfully refused to reinstate them. With respect to the September incident, the General Counsel made clear at the hearing that the intendment of the allegation is that even assuming this was not an unfair labor practice strike, it was the Respondent's failure to reinstate strikers who had not been replaced, and whose jobs were still open, that constituted violations of Section 8(a)(3) of the Act that day. As to the December offer to return, the General Counsel explained that in the event this was only an econom-

strike, no unfair labour practice was committed, because there is no proof of refusal to take strikers back to jobs still then open.

It is Dermontcourt's oral testimony that is said to prove an unqualified offer to return all the strikers in September. By that time there had been no meeting between the parties in over 3 months, and the Company's operations had never been discontinued. On the subject of what was said that [illegible] meeting arranged by the Conciliation Service, Dermontcourt testified somewhat ambiguously and evasively. He was not a very impressive witness. He started by saying [illegible] that we accept the Company's proposal of limitation of moderation for one year and that the people returned to work [illegible]." Replying: "The Union then proposed that the employees return to work and that the parties continue negotiating to try to arrive at a contract." Here his words seemed to combine two ideas — a suggestion that contract settlement and abandonment of the strike came hand-in-hand. He then admitted he did not say either to the company representatives or to the mediator that his offer was an unconditional one. He also said he did not recall whether the company lawyer asked was it an unconditional offer to return or not.

Mr. Mason, the industrial engineer, recalled it. Dermontcourt conferred for a time with the mediator and said "eighty-one people wished to return to work and that we had some things to discuss and that we had to sit down and hammer out a contract." Mason also testified that at this point Gardiner, the company lawyer, asked was this an unconditional offer and Dermontcourt replied "No." James Hodgson, the general manager, corroborated Mason that the

union agent replied to Gardner it was not an unconditional offer. He quoted Dernoncourt as saying: "We want to work out an agreement whereby the people be returned to their jobs * * * there are some conditions that need to be worked out * * * we need a contract that can be ratified by the people." And finally, Gardner gave like testimony, all uncontradicted by Dernoncourt: "* * * Mr. Dernoncourt sat down and said, 'The employees wanted to comeback to work.' And I said, 'Well, that's fine. Is this an unconditional offer to return to work on behalf of the employees?' And he said 'No, it is not.' He said, 'I would like to talk about a one year contract and a total package that will get ratification by the employees.'"

The Company expressed surprise at the turn of events and said it would have to consider its position and decide on what its proposals for a settlement would be. It also said there might not be any substantial number of job openings then. It did not thereafter, and has not since, hired any new employees except returning strikers. The parties did not meet again until December 18, when Dernoncourt told the Company in so many words he was offering to return the strikers "unconditionally."

Dernoncourt has been 30 years a union negotiator involved in collective-bargaining conferences, and strikes. He certainly knows the difference between an offer to make a strike settlement and an unconditional abandonment of strike by the employees. He knew what to say when he was of that frame of mind 3 months later. There is no reason for not crediting the testimony of the company witnesses that he admitted to them his offer in September had

strings attached. I find that the Union did not offer to return the strikers to work at that time, and shall therefore dismiss this allegation of the complaint.

The complaint alleges, the answer admits, and I find that all production and maintenance employees of the Respondent at its Bedford, Virginia, plant, excluding office clerical employees, watchmen and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The Respondent does not dispute the complaint allegation that at the time of the events, both before and after January of 1969, the Union was the exclusive bargaining agent of the employees involved. It asserts only that towards the end of the year, at about the time the employees abandoned the strike, the Union had lost its representative majority status. In view of the unfair labor practices committed in the early part of the year, and which provoked the strike, I find that the Union was at all times material herein and still is the exclusive representative of all the employees in the appropriate unit within the meaning of Section 9(a) of the Act.

Unfair Labor Practice Strike; Unconditional Offer to Abandon the Strike

The record shows without question that the reason why the employees struck in January of 1969 was to protest against the Respondent's unlawful refusal to bargain with their Union; it follows this was an unfair labor practice strike. It is equally clear that in December of 1969 the employees unconditionally offered to abandon the strike

and to return to work. In the circumstances they were entitled to be restored to their former positions, and the Respondent obligated to release striker replacements if necessary to make place for the returning strikers. And it is immaterial, in the circumstances, that the Union may not have complied with the filing requirements of Section 8(d) of the Statute before inception of the strike. See, *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270.

IV. The Remedy

It having been found that the Respondent, in violation of the Statute, unlawfully refused to bargain with the Union, it must be ordered to cease and desist from such practices and to bargain with the Union in good faith as the Statute requires, on demand.

V. The Effect of the Unfair Labor Practices upon Commerce

The activities of the Respondent, set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States; and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Upon the basis of the foregoing findings of fact I make the following:

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees of the Respondent at its Bedford, Virginia, plant, excluding office clerical employees, watchmen and supervisors as defined in the Act; constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union has been, and is now the exclusive representative of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment, within the meaning of Section 9(a) of the Act.

5. By refusing to bargain collectively with the Union as the exclusive representative of all its employees in the appropriate unit the Respondent has engaged, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that Moore of Bedford, Incorporated, Bedford, Virginia, its officers, agents, successors and assigns shall:

1. Cease and desist from

(a) Insisting, as a condition to entering into an agreement with the Union or any other exclusive bargaining representative of its employees in the appropriate unit, upon contract provisions which would grant it the uncontrolled right to fix rates of pay for piecework unilaterally and at the same time deny to the employees their rights to file grievances as to rates of pay for piecework.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive bargaining representative of all employees in the appropriate unit described above, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached embody such understanding in a signed agreement.

(b) Post at its place of business in Bedford, Virginia, copies of the notice attached hereto and marked Appendix.[2]

2. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and

Copies of said notice, on forms provided by the Regional Director of the Fifth Region, shall, after being signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps it has taken to comply herewith.[3]

Dated at Washington, D. C.

/s/ Thomas A. Ricci
Trial Examiner

Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

3. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT insist, as a condition to entering into an agreement with Textile Workers Union of America, AFL-CIO, or any other exclusive bargaining representative of our employees, upon contract provisions which would grant us the uncontrolled right to fix rates of pay for piecework unilaterally and at the same time deny to the employees their right to file grievances as to rates of pay for piecework.

WE WILL bargain collectively with Textile Workers Union of America, AFL-CIO, as the exclusive representative of our employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, and if an understanding is reached embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees of our Bedford, Virginia, plant, excluding office clerical employees, watchmen and supervisors as defined in the Act.

MOORE OF BEDFORD, INCORPORATED

(Employer)

Dated ..... By .....

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST
NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Federal Building, Room 1019, Charles Center, Baltimore, Maryland 21201 (Tel. No. 301 - 962-2822).

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1019

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

MOORE OF BEDFORD, INC., and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF ON BEHALF OF THE WORKERS DEFENSE LEAGUE, *AMICUS CURIAE*

Interest of the Workers Defense League

This brief *amicus curiae* is filed by the Workers Defense League with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The Workers Defense League (hereinafter "WDL") has for 35 years been concerned with the rights of those

members of American society most vulnerable to oppression. Its concern has resulted in extensive work in the areas of racial injustice, sharecroppers' and farm workers' rights, military security abuses, conscientious objectors' rights, forced labor and immigration and naturalization problems. It has come before this Court as *amicus curiae* in numerous human rights cases, including *NAACP* v. *Alabama*, 357 U.S. 449 (1958), *Morgan* v. *Virginia*, 328 U.S. 373 (1946), *Smith* v. *Allwright*, 321 U.S. 649 (1944), and *Walker* v. *Youell*, 316 U.S. 712 (1942).

Its central business, however, has always been workers' rights. This concern began at the time of WDL's role in the CIO's fight to exist in Mayor Hague's Jersey City. It grew through WDL's creation in 1964, together with the A. Phillip Randolph Foundation, of the Joint Apprenticeship Program, bringing minority youth into the skilled trades, which has grown from a shoestring to a 21-city operation, and which has placed 3,000 young men into various trades. It continues today in the WDL's work to create the Professional Household Workers Union, a new organization striving to bring the benefits of unionization to domestic workers. Labor cases in which WDL has come before this Court as *amicus curiae* include *Staub* v. *Baxley*, 355 U.S. 313 (1958), *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), *Hill* v. *Florida*, 325 U.S. 538 (1945), *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945), and *Apex Hosiery* v. *Leader*, 310 U.S. 469 (1940).

Time has seen some changes in the categories of persons most liable to abuse, and thus most in need of WDL

help, but one truth which persists is that the poor—wherever and of whatever color—are deprived of the rights of Americans.

Within the universe of industrial workers, pieceworkers are the poorest of the poor. Most American piecework, today as yesterday, is performed in the historically sweated industries—textiles and the needle trades—where the piecework system operates as the most effective of all speed-up devices. Of all industrial workers, pieceworkers are perhaps the most in need of union representation and of collective bargaining. This case arises because of the exploitation of pieceworkers, of the poor, and for that reason the WDL is concerned by it.

We are concerned for another reason. The great promise of the National Labor Relations Act was that for the first time the federal government would guarantee to workers "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ." National Labor Relations Act, Section 7; 29 USC §157.

The promise has been held out to American workers for 35 years now, but the attainment of the right has not been realized. Indeed, each year the National Labor Relations Board reports an *increase* in the number of cases of employers violating the most essential elements of the right to organize: firing employees because they try to organize unions, threatening to close their plants if the workers organize unions, and refusing to bargain once the employees have organized unions. These violations will continue and will increase until such time as the rights promised in

the National Labor Relations Act cease to be naked promises and are genuinely guaranteed by the government and the courts.

One tool which should secure at least minimum enforcement of the Act is the doctrine of *Universal Camera* and *Walton Manufacturing* [*Universal Camera Corporation* v. *NLRB*, 340 U.S. 474 (1951); *NLRB* v. *Walton Manufacturing Company*, 369 U.S. 404 (1962)]: *i.e.*, the doctrine that the decision of the National Labor Relations Board, if supported by substantial evidence, shall not be washed out by a court of appeals which seeks to substitute its own ideology for the provisions of the National Labor Relations Act. Of course the workload of this Court does not permit it daily to police *Universal Camera-Walton*. Tragically, the lack of policing permits a situation in which, in fiscal 1970 (the last year for which such figures are available), the courts of appeals affirmed the Board's decisions in only 68% of the cases on review. *Thirty-Fifth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1970*, Table 19A, page 195.

The Workers Defense League believes that the 68% figure is so low as to be cause for concern that the courts of appeals are seeking to rewrite the National Labor Relations Act. However, when we consider the experience of Textile Workers Union of America, AFL-CIO, in the Fourth Circuit (which experience, we are informed and believe, is that in the last two years the Fourth Circuit has denied enforcement in three out of the four TWUA cases before it in which the NLRB has found that employers had denied workers' rights under the NLRA) and spe-

cifically when we consider the instant case, we are more than concerned: what is happening here is the gutting of the NLRA.

Argument

The Workers Defense League urges the United States Supreme Court to grant certiorari for two reasons.

First, the NLRB has in this case demonstrated that the Employer has refused to bargain with the Union regarding the earnings of its pieceworker employees. The Board has directed the Employer that it must bargain. The Fourth Circuit, however, has invented a theory to justify the Employer in refusing to bargain regarding piecework earnings. This theory will work equally well for any piecework employer. It will eliminate collective bargaining regarding the earnings of pieceworkers. Once again, the group injured will be the group which is poorest and least able to defend itself. This is inherently a bad decision, which will impair the ability of a large group of low-wage and exploited workers to protect themselves, and which will do so by denying them their NLRA right to bargain.

Second, we urge the grant of certiorari because the decision below is not only inherently bad, but is also symptomatic of the current trend of a number of courts of appeals to rewrite and weaken the National Labor Relations Act, thereby betraying the promise which the United States extends in the NLRA, that the rights to organize and bargain will be protected by the government. The creation of a special loophole for piecework employers in the instant case, like the creation of a special loophole for 8(a)(3)

employers, struck down by this Court in *Walton Manufacturing Company, supra*, calls (we respectfully submit) for a review by this Court of what is happening to the National Labor Relations Act in the courts of appeals, and for guidance by this Court as to what should be happening.

Conclusion

For the foregoing reasons, the Petition of the Textile Workers Union of America for a Writ of Certiorari should be granted.

Respectfully submitted,

ROWLAND WATTS
Attorney for the Workers Defense League, Amicus Curiae

Dated: New York, N.Y.
February, 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1019

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioner,

v.

MOORE OF BEDFORD, INC. AND
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT MOORE OF BEDFORD, INC. IN OPPOSITION

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BRIEF FOR RESPONDENT MOORE OF BEDFORD, INC. IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals properly found (1) that there was insufficient evidence to support the Board's finding that the Company's bargaining proposal relating to arbitration of incentive rates trans-

gressed its bargaining obligation under the Act; and (2) that the Board's order was in violation of Section 8(d) of the Act and the Court's holding in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

STATUTES INVOLVED

In addition to the statutory provisions cited by Petitioner (Petition, p. 3), Respondent Moore of Bedford, Inc. also cites the following provision: Section 8(d) of the Act, 29 U.S.C. § 158(d):

> "(d) For the purposes of this Section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . ." (Emphasis added).

STATEMENT OF THE CASE

The Company and Union had enjoyed what the Trial Examiner of the Board termed "20 years of amicable and fruitful collective bargaining" since the Union's certification in 1948 (App., 25a).[1]

The Company is a small furniture enterprise in Bedford, Virginia, employing approximately 130 employees, about two-thirds of whom were paid at incentive piece work rates.[2] There are over 200 piece work rates in effect in the plant. These rates had his-

[1] "App." citations are to the Appendix attached to the Petition.

[2] The others were hourly paid.

torically been set and reset by the Company through time study and other industrial engineering techniques (App., 3a-4a, 27a).[2]

Prior to the 1968 negotiations, the collective bargaining agreement between the parties guaranteed the incentive employees at least $1.70 per hour, although the piece rates established by the Company resulted generally in actual earnings in excess of $1.70 per hour (App., 29a). The prior contract also contained a grievance and arbitration clause. Over the years issues arising as to individual piece rates had always been amicably settled through the grievance procedure. In 1968, however, the Union took four individual grievances to arbitration (App., 5a, 27a-28a). While acknowledging that he could not "set even a single rate," the arbitrator remanded the matter to the parties to work out a settlement, which was done (App., 29a). The arbitrator's ruling opened up the prospect of arbitrating the large number of individual piece rates without, as he admitted, any objective arbitral standard in the contract to guide his judgment.

When the parties met for bargaining in December of 1968, one of the Company's contract proposals was to establish a contractual standard for arbitration—which was that the incentive worker with the exercise of incentive effort could earn at least the established base rate for the job "under the least adverse conditions possible—." The right to earn at least the base

[2] Petitioner misrepresents the facts when it states that piece work rates were set "so that their yield would be reflective of each employee's prior actual earnings" (Pet., p. 5). No incentive system can operate in this fashion. Since such a system would obviously require different piece rates for the same job for each employee, it would be clearly discriminatory and impossible to administer.

rate was to be enforceable through arbitration (App., 5a, 31a).[4]

The Company also offered to increase the base rates for the various piece-rate jobs, offering base rates ranging from $1.80 to $2.25 per hour. The Company was flexible on these rates and attempted to negotiate on them (App., 8a-9a). But the Union adamantly refused to negotiate on the base rates. At one juncture, Dermoncourt, the Union Negotiator, stated that he would not negotiate on this basis even if he was offered $1.00 per hour increase in base rates—which, incidentally, would have raised the base rates to a level above the composite average earnings of all piece-rate workers.

In addition, the Company offered a 5½ percent increase in piece rates and agreed to put in writing that no existing piece rates would be lowered. The Company further offered to permit a Union time-study man to participate in job studies for the establishment of new piece rates. The Company also offered other economic concessions, and had other concessions which it was prepared to offer but was prevented from making them because of the Union's action in calling a premature strike in the midst of a bargaining session (App., 8a).

The Union's position on this issue was clearly revealed as an all-out onslaught against the entire incentive system. The Union proposed, alternatively, either that the incentive system be scrapped in favor of straight hourly rates or that incentive workers be guaranteed their past average earnings. The Board, itself,

[4] In explaining its proposal, the Company made it clear that there would be no restriction on the filing and discussion of grievances.

found that the Union was unwilling to "compromise" this adamant position (App., 14a).

The record showed that the Company proposal on piece-rate arbitration was less restrictive than a contract clause already accepted by this Union at a different employer's plant (Craddock-Terry) in the same area, which excluded piece rates from arbitration completely (App., 20a-21a). In addition the Company's proposal was almost identical to similar piece-rate arbitration clauses negotiated by this Company with another Union, the United Furniture Workers, at the Company's other plant in Greeneville, Tennessee. The petition completely omits these pertinent facts.

The Company on January 6, 1969 gave the Union an alternate offer and committed the offer in writing on January 9. The Company's alternate offer was for a two-year contract with lesser wage rate increases, *but including a reversion to the same arbitration language as appeared in the expired contract* (App., 19a-20a).

Despite this second alternative offer, which the Union never discussed with the employees, the Union called a strike in the midst of a bargaining session on January 28, 1969 before the Company had a chance to make other bargaining proposals (App., 8a, 19a-20a).

On December 18, 1969 the Union informed the Company that the strike was over and that the strikers wished to be reinstated. All of the strikers have by now either returned to work or stated that they did not wish to return after being offered reinstatement by the Company (App., 43a, 45a). Under the Board's order, however, the onus of the strike and a staggering backpay liability would be imposed on this small Company.

The Trial Examiner and the Board majority found that the Company's proposal on piece-rate arbitration was an unlawful refusal to bargain, without even purporting to assess the Company's overall good faith.

Neither the Trial Examiner or the Board majority questioned the overall good faith of the Company. Rather, the Examiner acknowledged that:

> "[T]he issue is a relatively narrow one and . . . if there was nothing wrong with the Respondent's adamant position in its resolve to change Article VI, Section 4, of the old contract, the complaint must be dismissed" (App., 30a).

And that:

> "[I]n no other respect is there direct evidence of antiunion animus or illegal conduct" (App., 30a).

Board Chairman Miller dissented holding that the Trial Examiner and the Board majority had "erred, both as to the facts and the law." He found that the Company proposed only to "revise the contract language so as to permit it greater flexibility in changing rates so long as a specified earning level was maintained."

He concluded that:

> "It is not, in my view, illegal for an employer to insist on channeling piece-rate disputes in the manner proposed, so long as the earnings level figure [the base rates] is negotiated in good faith. . . " (App., 18a-21a).

The court below reversed the Board and denied enforcement on two grounds.

The court held that it was not clear that the Company had insisted on its arbitration proposal, but, even if it

had, there was not substantial evidence on the record as a whole to support a finding that such insistence was an unfair labor practice (App., 3a).

The court rejected the Board majority's conclusion that the Company's proposal amounted to a demand for unilateral control over wages. The court pointed out that the Company had offered substantial increases in the base rates and had offered to negotiate these base rates, and that the Company's last proposal on base rates was the last only because the Union went on strike shortly after it was made. The Board majority's holding was based entirely on the "theory" that the base rates offered were so low as to be meaningless but since the record clearly showed that the base rates were fully negotiable there was no evidentiary predicate for the Board's conclusion that the Company refused to negotiate on wages (App., 7a-9a).

As a second ground, the court below held that the Board's order, as framed by the majority, "actually requires the Company either to abandon its proposed contract provision and accept the old contract provision as interpreted by the arbitrator or to accept straight hourly wages for all employees" (App., 9a). The court held that the Board's order, therefore, would violate Section 8(d) of the Act and the ruling of the Court in *H. K. Porter* v. *NLRB*, 397 U. S. 99 (1970) (App., 10a).

The court below also cited *Tex-Tan Welhausen Co.* v. *NLRB*, 434 F.2d 405 (C.A. 5, 1970), where, upon remand from the Court under *H. K. Porter*, the Fifth Circuit Court struck down an almost identical order (App., 10a).

ARGUMENT

1. The Decision Below Is Clearly Correct

On the facts of the case, the decision of the court below was clearly correct. Indeed, any other result would have violated principles established by the Court in *NLRB* v. *American National Insurance*, 343 U. S. 395 (1952), *NLRB* v. *Wooster Division of Borg-Warner Corporation*, 356 U. S. 342 (1958), and *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99 (1970).[5]

As the court below perceived, this was an unexceptional bargaining dispute over contract terms in the resolution of which the Board has no enforcement role to play. The issue came down to a disagreement over the standard of arbitration of piece rates, and since arbitration is a matter of agreement, this was an issue on which neither party was required to yield. The Court said in *Steelworkers* v. *Warrior & Gulf Navigation Company*, 363 U. S. 574, 582 (1960):

> "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

Contrary to *American National Insurance*, *Borg-Warner*, and *H. K. Porter*, the Board here singled out one Company bargaining proposal on a mandatory subject for bargaining and branded it unlawful without even the pretense of assessing the Company's overall good faith.

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[5] In *Borg-Warner*, the Court said: "Read together, these provisions [§§ 8(a)(5) and 8(d)] establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . . .' The duty is limited to these subjects, and within that area neither party is legally obligated to yield." *Borg-Warner*, 356 U.S. at 349.

The Board majority sought to defend its ruling in the court below by arguing that the Company was refusing to negotiate over wages. But, as the court below properly found, the Company was at all times willing and took the initiative in attempting to negotiate the base job rates. The Union, on its part, refused to negotiate the base rates and called a strike in mid-bargaining in an attempt to force the Company either to guarantee each employee his average earnings or to "accept straight hourly wages for all employees" (App., 9a). In view of the Company's willingness to negotiate the base rates, the court below found that there was no basis for the Board's finding that the base rates as originally proposed were too low in relation to the past average earnings of piece-rate workers.

Under these circumstances, the court below correctly held that there was not substantial evidence on the record as a whole to support the Board's finding. Moreover, as the court below found, the Board's order requiring the Company to remove a lawful proposal on a mandatory subject from the bargaining table and accept the Union proposal was clearly in contravention of *H. K. Porter*, and specifically of the ruling on remand in *Tex Tan*.

2. Petitioner Advances No Valid Reason for Granting the Writ

There is no claim of conflict in Circuits and no claim that the case presents an important question of federal law not heretofore decided by the Court.

The Universal Camera Argument.

Stripped of its rhetorical flourishes, Petitioner's claim is that the decision below in some way "blatantly disregards this Court's decision in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951) . . ." (Pet., p. 11).

Petitioner overlooks the fact that *Universal Camera* was basically an instruction to the Courts of Appeal to assume a more meaningful role in the review of Board decisions. The Court made this explicit:

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable bounds." 340 U. S. at 490.

The Court then made it plain that the gravamen of this reviewing responsibility was the enforcement of the substantial evidence rule:

> "That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals." 340 U. S. at 490.

The Court concluded:

> This Court will intervene only in what ought to be the rare instance when the standard [substantial evidence on the record as a whole] appears to have been misapprehended or grossly misapplied." 340 U. S. at 491.

We believe that we have shown that the decision of the court below was eminently sound and was a proper application of the substantial evidence rule. The Board majority's holding that the Company demanded unilateral control of wages simply could not be squared

with the uncontroverted evidence which showed Company willingness and Union unwillingness to negotiate the base rates. Moreover, since the Board's order concededly required the Company to abandon a lawful bargaining proposal on a mandatory bargaining subject, the order could not stand in the face of the governing principles enunciated by the Court in *American National Insurance* and *H. K. Porter*.

Petitioner makes the wholly frivolous argument that the court below should have bowed to the Board's judgment because of the Board's alleged "expertise" in comprehending the "testimony by skilled industrial engineers and other experts in furniture—piece-rate bargaining." Petition, p. 11.

In reality, the single expert witness on piece-rates was a Company witness. But, more important, the issues here do not turn on the complexities of piece rates but on the application of statutory evidentiary standards to the facts of the case. This is a "conventional judicial function," as the Court said in *Universal Camera*, which Congress has placed in the keeping of the Courts of Appeals.

The concerted attack by Petitioner and *Amicus* on the court below is an outright calumny not worthy of response.

Petitioner's "win and loss" record in four cases presenting widely varying issues can hardly provide a rational basis for a sweeping indictment of the court. Cases are not decided by the numbers but by the particular facts and the applicable law. We note, however, that a recent statistical analysis made to the Board shows that the Fourth Circuit Court of Appeals enforced the Board's order in 72.4 percent of the 29

Board decisions coming before it for enforcement or review in fiscal 1971, placing it at the exact mid-point among the 11 Courts of Appeal.[6]

Petitioner cannot make up for the total lack of merit in its case by mounting a wholly gratuitous polemic against the Court of Appeals.

CONCLUSION

For the foregoing reasons Respondent Moore of Bedford respectfully requests that the Court deny the petition of the Textile Workers Union of America, AFL-CIO for a writ of certiorari to review the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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[6] Report of Peter G. Nash, General Counsel, to the Board entitled "Statistical Report on Litigation During Fiscal Year 1971", dated September 1, 1971, p. 2.

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PETITIONER

v.

MOORE OF BEDFORD, INC., and
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board (with Chairman Miller dissenting) held that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by insisting, as a condition to entering into a new collective bargaining agreement with petitioner Union, upon contract provisions which both permitted the Company to determine new piece-

work rates unilaterally and restricted grievances concerning such determinations to the question whether they provided employees with a fair opportunity to earn the base rate (Pet. App. 11a-21a).[1] This conclusion rested on the Board's finding that the Company's final offer was a base rate of $1.80 per hour, while the employees were currently averaging $2.55 per hour, and that the real effect of the Company's proposal was to enable it, through the setting of new piecework rates, to reduce wages substantially without consulting the Union or affording grounds for a grievance (Pet. App. 12a-14a, 40a-41a). The Board entered a remedial order (Pet. App. 16a-17a, 49a-50a).

The court of appeals declined to enforce the Board's order (Pet. App. 1a-10a). The court found, contrary to the Board, that "the Company never refused to negotiate the base rate," and therefore "the insistence upon limiting the arbitration and grievance procedure to whether or not the base rate could be earned was not to insist upon the right to set wages unilat-

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[1] The majority of the Company's employees at the Bedford plant had traditionally been paid on an incentive piecework basis. By this method, the amount of compensation received by an employee is determined by the combination of the rate set for each different operation he performs and the number of times he satisfactorily performs such operation. The prior contract permitted the Company to adjust piecework rates unilaterally, subject to the proviso that an employee, with the exercise of incentive effort, could earn the base rate, which was set at $1.70 per hour. (Pet. App. 3a-5a.)

erally throughout the life of the contract" (Pet. App. 7a).[2]

2. While the Board believes that substantial evidence supports its finding that the Company insisted on a base rate which in context was so low as to be meaningless and that thus the court of appeals should have sustained that finding, in the Board's view the court's action presents only an evidentiary issue, which this Court has indicated it will not review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490; *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 410. For this reason, the Board did not file its own petition.

Moreover, while the Board agrees that the court below also erred in declining to sustain its unfair labor practice findings in "J. P. Stevens VI and VII" (Pet. 18),[3] in the Board's judgment the decisions in

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[2] The court added (Pet. App. 8a-9a):

> The last offer made by the Company was a base rate which varied from $1.80 to $2.00 depending on the employee classification. Nowhere does it appear that this was a final non-negotiable proposal. Furthermore, it seems that this proposal was the last one only because the Union voted to strike shortly after it was made. In short, there is simply no evidence that the Company refused to negotiate the base rate. * * * [And,] if the base rate were raised sufficiently, the Company would not have unilateral *control* over wages * * *.

[3] *Black Hawk Corporation* v. *National Labor Relations Board*, 431 F. 2d 900 (C.A. 4), union petition for certiorari denied, 401 U.S. 911; *J. P. Stevens & Co.* v. *National Labor Relations Board*, 449 F. 2d 595 (C.A. 4). (The union's pe-

those cases and in the present case do not establish that the Fourth Circuit has so consistently misapplied the "substantial evidence" standard of review as to warrant corrective action by this Court. See *J. P. Stevens & Co.* v. *National Labor Relations Board*, 406 F. 2d 1017 (C.A. 4); *Craddock Terry Shoe Corp.* v. *National Labor Relations Board*, No. 71-1060 (C.A. 4), order entered September 1, 1971, enforcing 187 NLRB No. 5; cf. *Wellington Mill Division, West Point Mfg. Co.* v. *National Labor Relations Board*, 330 F. 2d 579 (C.A. 4), Board petition for certiorari denied, 379 U.S. 882.

In sum, although the Board believes that the court below erred in failing to sustain the Board's unfair labor practice findings, it does not believe that an issue is presented which meets this Court's standards for certiorari. The petition should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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MARCH 1972.

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tition in *Black Hawk* was untimely, see Board's memorandum in opposition, No. 981, 1970 Term.)

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